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ABSTRACT

It can be expected that Cable Antenna Television (CATV) systems will serve as conduits for tomorrow's information networks. CATV holds promise for fulfilling this need because of its broad-band multi-channel capability. CATV can be thought of as having two basic functions. i.e., retransmitting TV programs, and initiating its own programs and services. With regard to the former, whether retransmitting local or distant signals there is currently no copyright liability. Pending legislation would impose copyright liability on the retransmission of distant signals, at least. Regardless of the CATV role as a retransmitter, insofar as self-initiated services are concerned it is in no better position than any other broadcaster, from a copyright standpoint. Accordingly, the information industry must learn to live with the copyright system if it is going to supply copyrighted material by CATV. It would behoove them to work within the system. To try to fight it at this point would be useless and not availing. (Other papers from this conference are available as LI 003360 - 003372 and LI 003374 through LI 003390) (Author)

WORKING GROUP C - PAPER 1 - PAGE 1

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Copyright Aspects of CATV as Utilized
In Information Networking

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Copyright Program Officer
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ABSTRACT

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CATV can be thought of as having two basic functions. i.e., retransmitting TV programs, and initiating its own programs and services. With regard to the former, whether retransmitting local or distant signals there is currently no copyright liability. Pending legislation would impose copyright liability on the retransmission of distant signals, at least.

Regardless of the CATV role as a retransmitter, insofar as self-initiated services are concerned it is in no better position than any other broadcaster, from a copyright standpoint. Accordingly, the information industry must learn to live with the copyright system if it is going to supply copyrighted material by CATV. It would behoove them to work within the system. To try to fight it at this point would be useless and not availing.

***Copyright Aspects of CATV as Utilized
In Information Networking**

by Morton W. Bachrach**
Copyright Program Officer
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Scope of paper:

Electronic communications will play an ever increasing role in the vital process of information dissemination and exchange. As I am sure many of the papers will attest, the conventional library system is inefficient and will not meet tomorrow's needs. The constraints upon moving from a conventional library system to a more automated, rapid, and convenient information system include technological, economical, inertial and legal. This paper will concern itself with the legal constraints and will concentrate upon the copyright problems involved, particularly as they relate to Cable Antenna Television (CATV), sometimes referred to as Community Antenna Television. CATV systems, which have a unique capability for mass information dissemination and exchange because of their broad-band, multi-channel characteristic are likely to be the links in the information networks of tomorrow. However, CATV also presents some very unique legal problems, This is so primarily because of the diverse interest groups involved.

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**The views expressed herein are those of the author only and do not necessarily represent the policy or position of the U.S. Office of Education.

These groups include the TV industry (the networks and independent VHF, UHF, STV (subscription TV stations) and radio, copyright owners, newspaper, common carrier, and the CATV industry itself. One could include also the users and potential users, and the Federal Government agencies looking after the users¹ interests, the Federal Communication Commission (FCC), the Justice Department and the Congress.

¹Some of the potential uses of CATV are set forth in paragraph 8 on page 5 of the FCC Notice of Proposed Rule Making and Inquiry, Docket No. 18397, released December 13, 1968: "It has been suggested that the expanding multi-channel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community, in addition to services now commonly offered such as time, weather, news, stock exchange ticker, etc. While we shall not attempt an all inclusive listing, some of the predicted services include: facsimile reproduction of newspapers, magazines, documents, etc., electronic mail delivery; merchandizing; business concern links to branch offices, primary customers or suppliers; access to computers, e.g., man to computer communications in the nature of inquiry and response (credit checks, airline reservations, branch banking, etc.) information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State and municipal level, e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs, e.g., job and literacy training, pre-school programs in the nature of "Project Headstart," and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g. community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community."

It should be borne in mind that the initially conceived function of CATV was to bring to those homes within a community, television signals which, because of the topography of the land, or because of some other interference, were not able to be received. Over the years CATV has grown very rapidly and has demonstrated its profit making ability. Because of its growth in size and in its technical capabilities, it has a potential for becoming a universal system and its capabilities in the information areas, as well as in the entertainment areas, are far reaching. For example, the initial CATV system was a three to five channel arrangement. As the technology improved, the capacity increased to twelve channels and now has a twenty channel and even greater capability.² It is the excess channels, those not needed for entertainment fulfillment, which hold enchantment for the information industry. This is so because the CATV system has the capability to originate its own programs as well as to retransmit off-the-air TV broadcasts.

Most of the problems to date, and most of the discussion, has involved conventional TV broadcast and CATV retransmission thereof. Although the legal aspects of program initiation are quite different from those of retransmission, the latter will be discussed first so as to establish an understanding of the concepts involved and as a means for distinguishing the two concepts, from a legal standpoint.

²Final Report, President's Task Force on Communications Policy, December 7, 1958, Chap. Seven at p. 36.

Copyrights of CATV in its conventional role of program retransmitter:

The current copyright statute was enacted in 1909, and has changed very little to this date.³ It is now codified as Title 17 of the U.S. Code. The Congress, in enacting the 1909 law, did not contemplate problems concerning CATV because such systems were not then in existence. As a matter of fact neither was television, and radio was only in its infancy. What has happened of course is that the law has not kept pace with the advances in technology. That has been recognized for a long time, and there has been a continuing effort to revise the copyright statute over the past fifteen years, with no substantial success to date.⁴ In 1967 a copyright revision bill⁵ was passed by the House of Representatives but the companion Senate bill⁶ was not passed. A similar bill was introduced in the 91st Congress but as yet has not come up for full Senate consideration.⁷

³Copyright Law Revision: History and Prospects by Barbara A. Ringer, in Automated Information Systems and Copyright Law, A Symposium of the American University, Reprint from the Congressional Record, Vol. 114, No. 102, June 11 to 14, 1968, at p. 2.

⁴Id.

⁵H.R. 2512, 90th Cong., 1st Sess. (1967)

⁶S. 597, 90th Cong., 1st Sess. (1967)

⁷S. 543, 91st Cong., 1st Sess. (1969)

Although federal laws are enacted by the Congress and, if revised, must be by the Congress, the law can change, or at least be extended, without Congressional action. One way is by court interpretation.⁸ Another is by action of a quasi-legislative body such as the Federal Communications Commission (FCC). That is what has happened in the fields of radio and television. The courts ruled on many copyright cases in those areas and frequently found that copyright infringement had occurred. The courts reasoned that the intent of Congress was to promote the progress of sciences and useful arts (U.S. Constitution Article 1, Section 8, Clause 8) by protecting the rights of persons in their intellectual creations. That is what Judge Herlands attempted in the landmark case of *United Artists Television Inc. v. Fortnightly Corporation*.⁹ Judge Herlands ruled that the defendant CATV systems had infringed the plaintiffs copyrights in motion pictures which had been broadcast under license by three distant TV stations, picked off-the-air by the defendants' antennas without permission, and

⁸"While statute should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries", Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F. 2d 411.

⁹255 F. Supp. 177, 149 USPQ 758, U.S. Dist. Court, S.D.N.Y. (Decided May 23, 1966).

retransmitted by cable to the defendant's subscribers. The Fortnightly case held that what the defendant had done constituted an unauthorized "performance" in violation of Section 1(d) of Title 17.

However, Fortnightly was appealed and although Judge Herlands was affirmed by the Court of Appeals for the second U.S. Circuit¹⁰, he was overruled by the U.S. Supreme Court.¹¹ The Supreme Court said, in effect, that it would not impute to Congress an intention which it could not possibly have had, i.e., to legislate on the copyright aspects of CATV. The Supreme Court decided to defer to the Congress its proper role insofar as CATV legislation is concerned.

An analysis of the Supreme Court decision in Fortnightly will show that the Court found itself on the horns of a dilemma.¹² It will show, I think, that the result was prompted as much by economical, and perhaps by social, consideration as by legal principles. If the Court had affirmed the decisions of the lower courts it would have thrown the entire CATV industry into turmoil. In effect the

¹⁰377 F. 2d 872, 153 USPQ 696 (May 22, 1967).

¹¹Fortnightly Corp. v. United Artists Television Inc., 392 U.S. 390 (June 17, 1968).

¹²Id. Mr. Justice Fortas, dissenting at p. 402: "This case calls not for the judgment of Solomon but for the dexterity of Houdini." Again at p. 403: "Applying the normal jurisprudential tools--the words of the Act, legislative history, and precedent--to the facts of the case is like trying to repair a television set with a mallet."

CATV industry would have had to cease to operate unless it could come to terms with the TV broadcasters, including the networks, and the copyright owners.¹³ That could well give the TV industry a strangle hold on the CATV industry and perhaps destroy it or force it to sell out to the powerful TV networks, despite the assurances by the TV industry that it would be reasonable with regard to granting copyright licenses to the CATV systems.¹⁴ In addition, an undertermined amount of retroactive royalty payments would have had to be made, the financial effect of which, upon the infant CATV industry, could not be predicted. The Supreme Court obviously did not desire to destroy the CATV industry because of its immense potential for social benefits, and it

¹³80 Harv. Law Rev. 1514-1537 (1967) at p. 1528: "Blanket extension of copyright liability to CATV, as was done in United Artists, could foster increased concentration of control of the communications industry. It would give major copyright holders not just a means of preserving their exclusive marketing arrangements, but a powerful weapon to gain control of the CATV industry itself. Most of the material which is used in the broadcasting industry is controlled by a very small group."

¹⁴Statement of Ernest W. Jennes, on behalf of Association of Maximum Service Telecasters, Inc., Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 89th Cong., 2d Sess., on S.1006, Aug. 2,3,4 and 25, 1966, at p. 125: "... I am unaware of any situation of the CATV system which is performing this function which has asked program producers for licenses either at a wholly nominal figure or indeed for permission to retransmit without paying anything and heard of such a request being turned down..."

obviously did not wish to make that industry a pawn of the powerful TV networks which could then either stifle its development or eliminate the desired competition between those two media.¹⁵

A matter of equity was also involved. As long as the CATV systems did no more than retransmit broadcasts of local TV stations then neither the TV broadcasters nor the other copyright owners were hurt, because then the CATV systems did no more than to fill in the holes, i.e., extend the reception to those homes which, for one reason or another, were unable to receive a signal which perhaps a neighbor was able to receive. Notwithstanding the assertions of the copyright owners that they should be entitled to a portion of any revenues, including CATV subscription proceeds, which results from the use of copyrighted materials, the likelihood is high that the copyright owners, even under Judge Herlands ruling, would still benefit from CATV operations limited to the

¹⁵Note 11 supra, Mr. Justice Fortas dissent at p. 403: "On the one hand, it is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications; or in its becoming a tool of the powerful networks which hold a substantial number of copyrights on materials used in the television industry."

retransmission of local TV broadcasts to local subscribers.¹⁶ And there is some question whether the copyright holders should receive an additional royalty in this circumstance. Some argue that the CATV subscriber would be paying a double royalty, once indirectly when he buys the advertiser's product, and once directly when the CATV operator passes on to him the royalty in the form of higher subscription fees.

However, the situation was more complex because first, the CATV systems wished to make their offerings more attractive to potential subscribers by bringing into the community broadcasts from distant stations, and second, by originating their own programs, both of which operations would tend to dilute the audience of the local

¹⁶Note 11, supra, at p. 881: "...defendent offered to prove at trial that the royalties paid to plaintiff by the original broadcasting stations took into account or could have taken into account the reception of the broadcasts by defendant's subscribers as well as by other members of the stations audiences ... Since this offer of proof was rejected, we shall assume its accuracy although it seems debatable, at least so far as the royalties were based upon revenues from local advertisers, who might well have had little or no interest in reaching Clarksburg and Fairmont viewers... or even from national advertisers who wish to advertise in Clarksberg and Fairmont through other stations or media."

TV station and consequently reduce the advertising revenue and reduce also the copyright royalties from local advertisers which are customarily tied to advertising revenues.¹⁷

A possible solution would be to take the stance that the retransmission of local programs would not constitute an infringement of the copyrighted materials whereas the retransmission of distant programs would. (The matter of CATV program initiation was not an issue before the courts in the Fortnightly case.)¹⁸

Neither the District Court nor the Court of Appeals considered such a divided result. Those courts treated the issue simply on a precedent basis, i.e., whether the retransmission of copyrighted materials constituted a "performance" within the

¹⁷Note 13 supra, at pp. 1523 and 1524: "One can confidently say that the copyright owner benefits when the audiences reached by CATV are in areas that do not have their own local stations. When, however, CATV begins to carry distant stations into another station's market, the copyright holders argue that, regardless of the effect CATV has on their revenues derived from distant stations, CATV has destroyed the penetrated areas as a market for future licensing of their programs since the local stations will not want to pay royalties and advertisers will be reluctant to sponsor a program which has already had a substantial showing in the area."

¹⁸Note 11 supra, footnote 6 on p. 392: "Some CATV systems, about 10%, originate some of their own programs. We do not deal with such systems in this opinion."

meaning of the copyright statute.¹⁹ Those Courts applied legal precedents, particularly the Jewell-La Salle Case;²⁰ came to the conclusion that such retransmission does constitute a "performance;" and accordingly held that such action constituted copyright infringement.

The Supreme Court, on the other hand, did consider but rejected the possibility of holding that retransmission of copyrighted materials from local stations would not constitute infringement whereas retransmission of distant signals would. That proposal was advanced before the Court by the Solicitor General of the

¹⁹Id. at p. 396: "The Court of Appeals thought that the controlling question in deciding whether the petitioner's CATV 'performed' other copyrighted works was: 'How much did the (petitioner) do to bring about the viewing and hearing a copyrighted work?' 377F2d. at 877. Applying this test, the court found that the petitioner did 'perform' the programs carried by its systems."

²⁰Id. footnote 18, p. 396: "The Court formulated and applied this test in the light of this Court's decision in *Buck v. Jewell-La Salle Realty Co.* 283 U.S. 191... But in *Jewell-La Salle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 US at 199, n.5. The *Jewell-La Salle* decision must be understood as limited to its own facts."

United States in an *amicus curiae* brief.²¹ However, the Court decided that retransmission did not constitute a "performance" within the meaning of the copyright statute,²² rejected the Jewell-La Salle concept,²³ reversed the lower courts, and let the CATV industry go "Scott free."

The Supreme Court rejection of Jewell-La Salle is questionable. It grounded its rejection on the fact that the original broadcast

²¹Id., footnote 32, p. 401: "The Solicitor General would have us hold that CATV systems do perform the programs they carry, but he would have us 'imply' a license for the CATV 'performances'. This 'implied in law' license would not cover all CATV activity but only those instances which a CATV system operates within the 'Grade B Contour' of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations. Sixth Report and Order, 18 Fed. Reg. 3905, 3915. Since we hold that the petitioner's systems did not perform copyrighted works, we do not reach the question of implied license."

²²Id. at p. 395: "At the outset it is clear that petitioner's systems did not 'perform' the respondent's copyrighted works in any conventional sense of that term, or in any manner envisaged by the Congress that enacted the law in 1909."

²³Id., footnote 30, p. 401: "It is said in dissent that, 'Our major object...should be to do as little damage as possible to traditional principles and to business relationships, until the Congress legislates...' Post, at 404. But existing 'business relationships' would hardly be preserved by extending a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context, post, at 405, n.3, so as retroactively to impose copyright liability where it has never been acknowledged to exist before."

in Fortnightly was authorized, whereas the original broadcast in Jewell-La Salle was not. However, as pointed out by Mr. Justice Fortas in his dissent, whether or not an original transmission is authorized does not affect whether the retransmission is a "performance" in a copyright sense.²⁴ Accordingly, since the holding was based upon the "performance" concept it is difficult to rationalize the Court's holding. Unfortunately, the Court did not respond to this key point made by Mr. Justice Fortas. It must be assumed then, I think, that the Court was "forcing" the removal of this stumbling block, the main precedent relied upon by the lower courts, in order to reach a result which it believed was proper.

But this still does not explain why the Supreme Court was unwilling to treat the retransmission of distant signals differently from the retransmission of local signals insofar as copyright infringement is concerned. The Court does not say. Most likely it was a reluctance to legislate. Mr. Justice Fortas merely remarks that

²⁴Id., Mr. Justice Fortas dissent at footnote 5. pp. 406 and 407: "The majority attempts to diminish the compelling authority of Buck v. Jewell-La Salle, by referring to a vague footnote in that opinion to the effect that the Court might not have found a 'performance' if the original broadcast, which was picked up by the hotel and brought to its various rooms, had been authorized by the copyright holder--as it was not. I cannot understand the point. Whatever might be the case in a contributory infringement action (which this is not), the interpretation of the term 'perform' cannot logically turn on the question whether the material that is used is licensed or not licensed."

"...I do not believe it is open to us, in construing the Copyright Act, to accept the Solicitor General's proposal.²⁵ The Court could have found legal justification for taking the divided approach. It stated, as a ground for holding that retransmission did not constitute a "performance" that "... CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer."²⁶ Whereas that statement may be true insofar as the reception of local signals is concerned it is obvious that a viewer must provide more than a roof top

²⁵Id., Mr. Justice Fortas dissent at footnote 2, p. 404: "The Solicitor General, in his brief on the merits, recommends that we adopt a compromise approach--finding a license implied in law with respect to some CATV operations, but not with respect to others. Regardless of the advisability of such an approach from the standpoint of communications, antitrust, and other relevant policies, I do not believe it is open to us, in construing the Copyright Act, to accept the Solicitor General's proposal."

²⁶Id., p. 399. The Court stated that: "Essentially, a CATV system does no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas."

antenna to receive broadcasts from stations beyond the reach of the most sophisticated roof top, or even community (in the original sense), antenna.²⁷

Nevertheless the Court preferred to defer the matter to the Congress²⁸ even though it was aware that the likelihood of immediate and comprehensive action by that body was unlikely.²⁹ Of course, the Court was aware of the legislative problems because of the difficulties already encountered with the copyright revision bills at the time the Court was deliberating on the Fortnightly case.

²⁷Id., Mr. Justice Fortas dissent at p. 407: "It may be, indeed that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a 'cooperative antenna' employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area--however that area be defined--which the broadcaster normally serves. In such a case the CATV is performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes."

²⁸An explanation of the Court's stance may be gleaned from Justice Brandeis dissent in International News Service v. Associated Press, 248 US 215 (1918) wherein at p. 267 he states: "Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in an effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear."

²⁹Note 11, supra at p. 404: "An important legal issue is involved. Important economic values are at stake, and it would be hazardous to assume that Congress will act promptly, comprehensively, and retroactively."

The responsibility of Congress to legislate:

Congress would appear to be the most appropriate agency to take action in this matter and fill the vacuum left by the Supreme Court decision in the Fortnightly case. That body had been biding its time awaiting the outcome of the Fortnightly litigation. When the Supreme Court left the situation unchanged, the focus of attention was redirected toward the Congress. However, the Congress is a broad diverse body and is quite sensitive to pressure groups. Its record in the field of copyright legislation is not very creditable. Congress has been trying to enact needed copyright reform for the past fifteen years, without success. Miss Ringer reflected a measure of frustration when she remarked in 1967 that:³⁰

"Two years ago our most significant problems came from jukebox performances and educational copying, today they come from uses by computers and community antenna television systems, and two years from now there may well be whole new industries whose future will be directly affected by the copyright law."

Miss Ringer tells us that, when Subcommittee No. 3 on Patents, Trademarks and Copyrights of the House Judiciary Committee held hearings on the copyright revision bill in 1965 that a "total of 163 witness, representing an extraordinarily wide range of public and private interests" testified. The record of those hearings comprised nearly 2,000 pages of printed text.

³⁰ Note 3. supra.

The CATV problems were so severe in 1967 that, in order for the House of Representatives to pass HR 2512 it was necessary to delete the CATV provisions.³¹ The history of the copyright revision legislative attempts, from the time bills were introduced in both the Senate and the House of Representatives in 1965, and even before that, up to the present time, is a story in itself, and is beyond the scope of this paper. However, that story is set forth in detail in Miss Ringer's paper. Suffice it to say no legislation has been enacted and its prospects, particularly the CATV provisions, are none too encouraging.

In the meantime the CATV industry has continued to grow, to improve, and to attach its roots more firmly into the communications terrain. As the industry grew its impact upon the TV industry and the public increased. The problems became so severe that the Federal Communications Commission decided to assume certain authority over the CATV industry in 1965.³² That jurisdiction continued to expand as the recognized problems have become more complex.³³

³¹Id.

³²Public Notice, Regulation of CATV Systems, 6 Pike & Fischer Radio Reg. 2d 1637 (15 February 1966), followed by Second Report and Order, 6 ed. at 1717 (8 March 1966).

³³Note 13, supra at p. 1532: "In the fast-changing field which involves many considerations besides protecting copyright property, it would appear wiser to continue to rely on FCC regulations which can be changed as needs require rather than impose judicially a rigid rule of general CATV liability."

The role of CATV in information systems:

Perhaps the potential for CATV to satisfy social needs is not fully appreciated. As has been stated before, it is the multi-channel capacity of the CATV systems which holds tremendous potential for satisfying these needs. The President's Task Force on Communication Policy,³⁴ speaking about the television industry, which includes for these purposes the CATV industry, has stated that:

"The structure of the industry should make it possible to cater to as wide a variety of tastes as possible, the tastes of small audiences and mass audiences, of cultural minorities and of cultural majorities. Ours is a pluralistic society, in culture as well as in the ethnic origins and the life styles of its people. A medium of expression as pervasive as television should reflect and enrich the cultural pluralism.

"Television should serve as varied as possible an array of social functions, not only entertainment and advertising, important as they are, but also information, education, business, culture, and political expression."

It goes without saying that TV has had a tremendous impact upon our society.³⁵ However, as presently constituted, the industry

³⁴Note 2. at p. 3.

³⁵Id., p. 1: "The average American family has its television set turned on for more than six hours a day."

cannot fulfill the stated needs.³⁶ One reason is the relative lack of competition among the media.³⁷ More importantly, however, is the natural limitation upon the available over-the-air frequency spectrum.³⁸ Even so, because of interference between adjacent stations the FCC has had to limit any one locality to just a few channels.⁴⁰

It is true that the UHF channels are not so severely limited, although they are limited in other respects.⁴¹ The UHF segment of the industry has operated at a disadvantage vis a vis the VHF

³⁶Id., p. 5: "The television industry has not yet achieved a diversity and variety in programming comparable to that of book or magazine publishing, radio, or movies. The situation is roughly analogous to that of the movie industry prior to the 1950's. Before that time, four or five large studios provided most of the films, and generally aimed at the largest possible national and international audiences for each film. Their policies have been altered by the growth of independent film makers and distributors who cater to specialized tastes and interests and, in many instances to much smaller markets."

³⁷Id., p. 10: "Cable systems now serve some three million subscribers, out of some 58 million homes equipped with television."

³⁸Id., pp. 13 and 14: "A television channel requires more band width (or spectrum space) than a radio channel."

³⁹Id., p. 14.

⁴⁰Id., p. 14.

⁴¹Id., p. 15

segment, and has not made a significant impact. The reasons are numerous. In the first place the VHF segment was established first and in a sense monopolized the potential viewing audience. It has operated and continues to operate from a position of strength, buttressed by the very strong network arrangements. It has been an up hill battle for the UHF stations, virtually all independents, and including the noncommercial so-called educational stations. In the early days of the TV industry very few TV sets were equipped to receive UHF. Equipping a receiver with a UHF adapter was expensive and not many viewers were willing to undertake the expense. Then in 1964 the Congress enacted legislation requiring the manufacture of all TV sets with a UHF receivers.⁴² However, by that time TV viewing habits were well established. Besides it was inconvenient to tune into a UHF broadcast because the receivers were not equipped with a "click" type of selector. Furthermore, the marginal nature of the UHF business has discouraged many UHF owners from providing the power necessary to assure uniformly clear pictures for the viewing public.

CATV appears to be the answer insofar as the provision of the multi-channel capacity is concerned. It can retransmit many of the existing TV frequencies clearly, including UHF frequencies, which it can reduce to VHF frequencies for ease of transmission

⁴²Id., p. 15.

and convenience of selection on the home receivers.⁴³ And there will still remain a large number of channels for CATV program initiation and for lease to others for the provision of various services.

But CATV does have some drawbacks. In the first place a subscription fee is required.⁴⁴ Although that fee is deemed to be reasonable in the light of the services received it is recognized that the requirement of the fee will make the service prohibitive for some viewers. Accordingly, there is a strong desire to encourage the continuance of free over-the-air broadcasts, including UHF availability. In the second place it uneconomical to bring CATV into sparsely settled rural areas.⁴⁵ Accordingly, there is a strong desire to encourage

⁴³79 Harvard L. Rev. 366 (1965), at pp. 366 and 367: "The system theoretically can relay signals of up to thirty-five stations both ultra high frequency (UHF) and very high frequency (VHF) -- to subscribers, and the operator can place the signals on whatever cable channel he chooses."

⁴⁴Note 11, footnote 7, p. 393: "The monthly rate ranged from \$3.75 to \$5, and customers were also charged an installation fee. Increased charges were levied for additional television sets and for commercial establishments."

⁴⁵Note 13, footnote 54. p. 1524: "Since CATV cable costs average \$3500 to \$4000 per mile, CATV can be profitably operated only in areas where residences are in close proximity to each other. This means that CATV cannot expand its operation for beyond the confines of towns and cities. Consequently it cannot reach those persons in outlying areas who can receive their programming 'off the air'..."

the servicing of such areas by over-the air TV either directly from satellite or repeater stations.

The foregoing should serve to give the reader a feel for the magnitude of the problems currently confronting the FCC. There are delicate balances which must be struck or preserved by the FCC in its regulatory role.⁴⁶ The point to be borne in mind is that for CATV to prosper, conventional TV must prosper. And for CATV to provide facilities for information delivery and exchange, the CATV systems must be permitted to grow and mature. They will only do so by offering to the subscriber what he wants. Right now he wants a choice of high quality entertainment. When that need is satisfied he'll gradually come to want, and then demand, those

⁴⁶Id., at p. 1531: "CATV copyright liability should be evaluated in the light of the efforts of the FCC to deal with CATV by direct regulation. In recognition of the varied impact which CATV has on its objectives, the FCC, after initially declining jurisdiction, has begun to regulate CATV by the promulgation of a series of station carriage rules for CATV systems. In order to minimize the audience drawn away from local stations, CATV must carry, on request, the signals of any stations within whose 'B contours' it operates, and it must 'black out' from its transmissions of distant stations, any programming carried on the same day by the local stations. In an effort to promote the development of independent and educational television stations in areas which may have a sufficient population to support them the FCC has laid down a general prohibition against the carriage of outside station signals into the 100 most important television markets, where the development of independents seems most likely. Subject to these restrictions, the FCC is allowing CATV to continue and expand operations in order to help fill the gaps in existing service and provide more varied programming service."

other services which are as yet beyond the horizon but which hold out such great hope for fulfillment.

In 1968 cable systems served some three million subscribers, out of some 58 million homes equipped with television.⁴⁷ Obviously cable systems must become more universal before networking--entertainment, information, or otherwise--will become feasible. Cable systems are growing rapidly and that growth is sure to accelerate if subscribers are given what they want (several channels of entertainment, supplemented by CATV initiated programs and services) at a reasonable charge.

A CATV system which functions in the conventional sense, as a result of the Supreme Court decision in the Fortnightly case, need not concern itself with copyright problems. It uses all copyright materials with impunity.

Of course Congress could legislate and change the status quo. Bill S. 543 which would impose copyright liability in other than retransmission of local programs has already made some progress in the 91st Congress. It has been reported out of the Subcommittee.⁴⁸ However, even if the Senate should act there still must be action in the House of Representatives, and a resolution of any differences. As time passes with little progress the chances for enactment, at least during the 91st Congress, become less promising.

⁴⁷ Note 2 supra, at p. 10.

⁴⁸ Announcement from the Copyright Office, Library of Congress, ML70, December 31, 1969--2,000.

The ever increasing role of the FCC.

In the meantime, as has been stated, the FCC is moving in to fill the vacuum. Certainly the FCC cannot impose copyright liability, only the Congress can do that.⁴⁹ However, it can regulate, or attempt to regulate, in a manner which will be equitable to all interests. What the copyright owners could not obtain directly through Congress or the Courts they could perhaps obtain indirectly through the FCC. For example, should the FCC follow through on its proposal to require CATV systems to substitute local TV advertisement, particularly UHF TV advertisement, for the advertisement associated with the distant signals which it would retransmit,⁵⁰ the copyright royalties from local programs would increase because they are tied by agreement to advertisement revenues.

⁴⁹ FCC Second Further Notice of Proposed Rule Making, Docket No. 18397-A: "11. There is also the issue of fairness to the copyright owners. This, however, is not a matter which can be resolved by this Commission. Only the Congress can impose what it believes to be fair compensation in the circumstances. Our concern here is therefore the narrow issue whether the proposal is defective in that the copyright owner cannot be treated fairly thereunder. We have studied the question in that light, and have tentatively concluded that there is no bar in this respect."

⁵⁰ Id.

Such action could relieve some of the pressure on the Congress which would like very much to enact copyright revision. If it could eliminate from consideration some of the more controversial provisions, such as CATV, it would obviously have a better chance of passing the legislation. Thus, the possibility of Congress eliminating the CATV provisions and, in effect, relegating the matter to the FCC must be recognized.

Copyright liability for CATV initiated services:

But whatever happens in this regard the furnishing of self-initiated information services by CATV systems will be unaffected. Such information and data will not be transmissible, if copyrighted, without obtaining licenses, individual or blanket, from the copyright owners. The copyright shelter afforded by the Fortnightly case is not available to the CATV industry for the programs it originates. That was alluded to by the Supreme Court in Fortnightly.⁵¹ It was specifically so held by the District Court

⁵¹Note 11 supra.

in *Walt Disney Productions v. Alaska Television Network, Inc., et.al.*⁵² In this situation the CATV system is a broadcaster rather than a retransmitter and as such stands in the same position vis a vis the copyright holders as does the conventional TV broadcasters.⁵³

The immediate reaction of some, to the last point made, is that copyright liability will make it impossible to construct an effective information networking system because it is difficult to obtain copyright licenses. Of course that is the same type of problem which is currently facting the information industry in regard to computer storage and retrieval systems.⁵⁴ Actually

⁵²D.C.W.D. Washington, N. Div., 164 USPQ (Decided Nov. 17, 1969)

Headnote:

"Defendant made video tape of Washington television station's broadcast of copyrighted motion pictures, transported tape to Alaska and, about a week after broadcast, disseminated pictures by use of tape over defendant's coaxial cable to subscribers who viewed pictures on their television receiving sets; preparation of tape infringed upon copyright owner's right under 17 U.S.C. 1 (d); dissemination over cable system also constituted infringement; whether dissemination constitutes a 'performance' is immaterial."

⁵³Id. at p. 213: "The 'recording' system used by the defendants captured the impulses and put them in such form that they were capable of being perceived, with proper equipment, innumerable times, and after the passage of time, subject only to the limitations imposed by the characteristics of the plastic tape upon which the iron particles were mounted."

⁵⁴Project New Technology and the Law of Copyright: Reprography and Computers, Meville B. Nimmer, UCLA Law Review, Vol. 15, No. 3, April 1968.

the computer problem and the transmission problem might be considered companion problems insofar as the copyright aspects are concerned because it is likely that the information to be transmitted will frequently originate from a computer storage and retrieval system. The latter is deemed to be such a complex problem that it is not addressed directly by S.543. Instead Title II of that Bill would establish a Commission to study the matter and make recommendations for future legislation. It is likely that the transmission problems will be studied along with the companion computer problems in the event the copyright reform bill is enacted into law, and the Commission is established pursuant thereto.

As of now no CATV systems are deemed to constitute common carriers within the meaning of the Communications Act of 1934.⁵⁵ There is a possibility that such systems will be treated as common carriers if one or more channels are utilized for the transmission of data as a conduit for an information system.⁵⁶ Although common carriers are immune from copyright liability that arrangement cannot be utilized to avoid the copyright problems. In that event the offense is merely shifted from the transmitter to the originator. Copyright licenses would still be a prerequisite to information delivery and exchange.

⁵⁵Title 47, U.S. Code

⁵⁶Note 2. *supra* at p. 50

Need to recognize copyright incentives.

However, the current situation with regard to potential copyright liability should not be used as an excuse for not pursuing with vigor the establishment of information networks and the provision of other information services. After all, a great deal of information is already in the public domain and available for unhampered use. Licenses for other materials may be easily obtainable at a reasonable cost. Those materials which are beyond reach insofar as the obtainment of licenses is concerned will have to be eliminated from the systems, at least until such time as those materials do become available for licensing. That could happen through legislation, industry agreements, or changed economic circumstances.

It is a view among some, particularly in the educational community, that copyright licenses and royalties should not be required when the purpose of the system in which copyrighted materials will be utilized, is educational.⁵⁷ Those who take a strong stand in this regard often overlook the fact that, except for the incentives the copyright system provides, much of the materials they would dispense royalty free, would not then be available for use in the

⁵⁷Copyright Legislation and You, by Doris M. Timpano, Editorial Communications Consultant, Richard S. Grossley Intermediate School, Jamaica, New York, in Today's Education, NEA Journal, April 1969.

first place. Education, even in its narrower context, constitutes a huge market for copyrighted materials. Remove that market from the copyright incentive system and you destroy that market.

Some say that authors would continue to write even without the royalty incentive.⁵⁸ That may be true to some extent. However, such writing would devolve into a part-time activity. After all an author must sustain himself and his family. If he must depend upon other sources for his income then the main focus of his activities will not be on his writing. He will not likely have the time to write books, as contracted with articles. Books

⁵⁸The Copyright Law Revision and ETV: An Alternative to the Wasteland? 23 Rutgers Law Review 104-140, No. 1, Fall 1968, Note 46; pgs 112 and 113: "The possibility exists, however, that 'community welfare' may, in fact, be adversely affected by the grant of an exception to ETV (Educational Television). Hypothetically, ETC's use of copyrighted materials could affect the incomes of authors so drastically that they may be discouraged from continuing their work. That the incomes of authors (as distinguished from copyright proprietors) could be substantially affected seems an unlikely event if ETV's free use of copyrighted materials is reasonably controlled That creative individuals will lose the urge to write, for example, seems even less likely. If any result can be predicted at this time, it is that more individuals will achieve the level of literacy needed to produce or consume copyrighted materials because of ETV's influence."

normally constitute the in depth treatment of a subject whereas articles often provide a much shallower treatment. What we need then is to increase the incentives rather than to decrease them.⁵⁹ Society cannot afford to lose one potential masterpiece for the lack of providing an adequate incentive.

Accordingly, let us pay for copyright property the same as we pay for other necessary educational expenses, such as buildings, electricity, teachers' salaries, and in the information business, transmitters, wires, computers, etc. Let us not despair because copyright appears to be an obstacle, but persevere to establish effective systems by working to overcome obstacles within, and not without, the incentive systems which have contributed so much to the rich heritage we all today enjoy.

It is possible that Congress will act to ease the copyright impact insofar as educational TV broadcasting is concerned. That could have an impact upon CATV retransmissions. However, it is clear

⁵⁹In International Copyright - A World View, Bulletin of the Copyright Society of the U.S.A., Vol. 17, No. 3, February 1970, at pp 14 and 149, Eugene M. Braderman, Deputy Assistant Secretary for Commercial Affairs and Business Activities, United States Department of State, declares: "The purpose of copyright and patent law is to encourage and reward creativity, and I am not one who thinks that encouragement and reward should be granted grudgingly. Strong copyright laws and high levels of cultural and intellectual attainment go hand-in-hand."

that any relief will be severely limited. Congress does not want to kill the goose which lays the golden egg. Information network planners should not be deluded into believing that any such easing will supply much relief insofar as information systems are concerned in the foreseeable future. Again, such planners are urged to recognize that copyright is with us and will stay. They should embrace copyright, live with it, and succeed in their endeavors despite of and because of it.

Conclusion:

It can be expected that CATV systems will serve as conduits for tomorrow's information networks. CATV holds promise for fulfilling this need because of its broad-band multi-channel capability. However, CATV cannot be dealt with in one capacity alone. It must be considered at one time in its many capacities inasmuch as they are interdependent. In order for CATV to successfully serve in its information networking role it must be successful in its many other roles. Unless that happens CATV will not be a universal system; its ability to serve information users will be limited.

CATV can be thought of as having two basic functions. i.e., retransmitting TV programs, and initiating its own programs and services. With regard to the former, whether retransmitting local or distant signals there is currently no copyright liability. Pending legislation would impose copyright liability on the retransmission of distant signals, at least.

The role of the FCC is increasing. If it can regulate in a way as to satisfy all concerned it is likely that Congress will not legislate. However, the FCC will find it difficult to balance all the interests, e.g., the UHF and the VHF, the networks and the independents, and the CATV and the broadcasters and other copyright owners. One thing the FCC is determined to do is to assure an adequate choice of free over-the-air broadcasts. Another thing it is determined to do is to give CATV an opportunity to mature and provide the services for which it only is capable.

Regardless of the CATV role as a retransmitter, insofar as self-initiated services are concerned it is in no better position than any other broadcaster, from a copyright standpoint. Accordingly, the information industry must learn to live with the copyright system if it is going to supply copyrighted material by CATV. It would behoove them to work within the system. To try to fight it at this point would be useless and not availing.

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